No. 80-345

OCT 28 1980

MICHAEL RODAK, JR., C

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

QUINAULT PACIFIC CORPORATION, INTERNATIONAL PAPER COMPANY, W. KENT BISHOP, WHITE LUMBER SALES, INC., and GOLD REY FOREST PRODUCTS, INC., Petitioners,

versus

AETNA BUSINESS CREDIT, INC., JOHN C. PENNINGTON, TRUSTEE, and FREEMAN & HAWKINS, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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SUPPLEMENTAL QUESTION EVOKING THE SUPERVISORY POWER

Whether special and important reasons for review on writs of certiorari are presented where (a) respondents' briefs admit *ex parte* judge-initiated requests for draft judicial opinions but justify compliance and non-notification of petitioners as "common practice in the bankruptcy courts [in Georgia]" (although a condemned practice in Florida), (b) charges of misconduct are printed on front page of THE ATLANTA CONSTITUTION casting cloud on the bankruptcy judge and to a lesser extent on the district judge, (c) the titular head and "name partner" of respondent Aetna's law firm (Robert J. Kutak) is chairman of American Bar Association committee which published 1980 draft "Model Rules of Professional Conduct," and (d) Congress has just exercised (October 2, 1980) another check upon the lower judiciary by passing unprecedented legislation to discipline lower federal judges for misconduct short of impeachment.

TABLE OF CONTENTS AND AUTHORITIES **Page**

I. SUPPLEMENTAL QUESTION EVOKING THE SUPERVISORY POWER i

II. TABLE OF CONTENTS AND AUTHORITIES i

III. REVIEW SHOULD BE GRANTED

A. "Common Practice in Bankruptcy Court" vs. Condemned Practice in Florida

B. Publicity

C. Judicial Cloud 1

D. Ethical Guidance to *Kutak Commission* 1

E. Legislative Check on the Judiciary . 3

IV. COURTS OF APPEALS CONFLICTS 4

A. The Fee Award Case. 4

Circuit Conflict (1). "To justify a fee award, must an adversary party's attorneys' fees be *proximately* caused by

the offending litigant's or his attorney's bad faith conduct, or must the fees simply bear a casual "but-for" relationship to bad faith conduct." 4
Circuit Conflict (2). "Whether the standard of appellate review upon a trial judge's findings of fact adopted via *ex parte* work sessions *should be* the "clearly erroneous" standard under Fed.R.Civ.P. 52." 5
B. The 60(b) Case. 6
Circuit Conflict (3). "Whether it is relevant for purposes of 28 U.S.C.A. Sec. 455, Fifth Amendment Due Process, Code of Judicial Conduct for United States Judges that facts of disqualification *constitute* "extrajudicial" acts." 6
Circuit Conflict (4). "Whether a trial judge's automatic adoption of a prevailing party's findings of fact *is acceptable."* 7
Circuit Conflict (5). "Whether 'fraud . . . , misrepresentation, or other misconduct of an adverse party' (Fed.R.Civ.P. 60(b)(3), *must be 'prejudic[ial],'* 607 F.2d 117, 118, before a trial judge will relieve an opposing party from a final order of a bankruptcy judge approving a settlement between a trustee and a creditor." . . . 7

V. FALSE ASSERTION THAT JURY TRIAL ISSUE NOT RAISED BELOW 8

A. Briefs in Court of Appeals in Which Raised 8
B. District Judge's Premature Affirmance 8
C. Question of Waiver of Jury Trial in Bankruptcy Court. 9

VI. CONCLUSION. 10

AUTHORITIES

CITATIONS

Aetna Insurance Co. v. Kennedy, 301 U.S. 389 (1937) 10

Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583 (2d Cir. 1965) 1

Baumgartner v. United States, 322 U.S. 665 (1944) 6

Berger v. United States, 255 U.S. 22 (1921) 3

In re Boyd, 308 So.2d 13 (Fla. 1975) 1

Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977) 5

Collins v. Government of Virgin Islands, 366 F.2d 279 (3rd Cir. 1966) 10

Columbia River Packer's Association v. Hilton, 34 F. Supp. 970 (D. Ore. 1939) 10

Davis v. Board of School Commissioners, 517 F.2d 1044 (5th Cir. 1975) 3,6

In re Dekle, 308 So.2d 5 (Fla. 1975) 1

Dollar v. Land, 184 F.2d 245 (D.C. Cir. 1950) 6

Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979) 4

Hadco Products, Inc. v. Walter Kidde & Co., 462 F.2d 1265 (3rd Cir. 1972) 6

Hatahley v. United States, 351 U.S. 173 (1956) 1

Marbury v. Madison, 2 L.Ed 60 (1803) .. 3

Mitchell v. Sirica, 502 F.2d 375 (D.C. Cir.) *cert. denied* 94 S.Ct. 3232 (1974) 3

Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979) 7

Oliver v. City of Shattuck, Oklahoma ex rel. Versluis, 157 F.2d 150 (10th Cir. 1946) 8

Orvis v. Higgins, 180 F.2d 537 (2d. Cir. 1950) 5

Payton v. New York, — U.S. —, 100 S. Ct. 1371 (1980) 1
Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972) 9
Prune Yard Shopping Center v. Robins, — U.S. —, 100 S.Ct. 2035 (1980) 1
Ramey Construction Co. v. Apache Tribe of Mescabro Reservation, 616 F.2d 464 (10th Cir. 1980) 7
Roberts v. Ross, 344 F.2d 747 (3rd Cir. 1965) 5
Teamsters, Local Union No. 688 v. Crown Cork & Seal Co., 488 F.2d 738 (8th Cir. 1973) 6
United States v. Brown, 569 F.2d 236 (5th Cir. 1978 10
United States v. Crescent Amusement Co., 323 U.S. 173 (1944) 7
United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) 7
United States v. General Motors, 384 U.S. 127 (n. 16) (1966) 5
United States v. Grinnell Corp., 384 U.S. 563 (1966) 4
United States v. John McShain, Inc., 258 F.2d 422 (D.C. Cir. 1958) 6
United States v. Nixon, 418 U.S. 683 (1974) 3

UNITED STATES CONSTITUTION

Article III, Sec. 1 and 2 1

STATUTES

28 U.S.C. Sec. 144 3
28 U.S.C.A. Sec. 455 3

OTHERS

American Bar Association, *Discussion Draft of the Model Rules of Professional Conduct*, January 30, 1980 2

THE ATLANTA JOURNAL, October 2, 1980 4

THE ATLANTA JOURNAL, October 17, 1980 1

W. Brennan, *State Constitutional Rights*, 90 Harv.L.Rev. 489 (1977) 1

The Federalist 3

S. Kantor, *Two Atlanta U.S. Judges accused of Legal "Misconduct,"* THE ATLANTA CONSTITUTION, October 17, 1980 1

R. Kutak, *Model Rules of Professional Conduct*, 66 Am.B.J. 47 (January 1980) 2

III. REVIEW SHOULD BE GRANTED

A. "Common Practice in Bankruptcy Court" vs. Condemned Practice in Florida

Aetna advances that petitioners' view of disqualifying facts is "a common practice in the bankruptcy courts of this State ...." (Aetna's brief at 8). The trustee presumably agrees.[1] Neither the trustee's nor Aetna's brief addresses petitioners' evidence of *ex parte* conferences of September 15, 16, 19, and 20,[2] nor that petitioners were not served with copies of the proposed and submitted orders of September 16 and 23.[3] Thus, the issue is squarely presented: *Is this so-called*[4] *common (but secretive) practice to be approved by the Supreme Court?*

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[1] "The account of the facts set forth in the brief of the Respondent, Aetna Business Credit, Inc., is entirely accurate." (Trustee's brief at 8.)

[2] See App. at 244, 245, 246, 247, respectively.

[3] See Reply Brief of Petitioners in 80-344 at 1.

[4] Neither petitioners nor counsel had heard of such a practice prior to respondents' appellate briefs.

Yet the issue is not *a priori*. Florida's highest court has condemned secret opinion-writing. *In re Dekle*, 308 So.2d 13 (Fla. 1975); *In re Boyd*, 308 So.2d 5 (Fla. 1975). *Is this Court to ignore developing concepts of due process of law in respect of judicial ethics?* The Court has not ignored more expansive State constitutional doctrine in other areas. *Payton v. New York, 100 S.Ct. 1371 (1980); Prune Yard Shopping Center v. Robins, 100 S.Ct. 2035 (1980);* W. Brennan, *State Constitutional Rights*, 90 HARV.L.REV. 489 (1977).

B. **Publicity**

The trustee asserts that these cases "are devoid of any issues of public importance." (Trustee and Freeman & Hawkins' brief at 8.) In fact, these cases have been reported on the front page of THE ATLANTA CONSTITUTION.[5]

C. **Judicial Cloud**

The bankruptcy and district judges were named[6] in the local newspaper articles.[7] Petitioners' counsel, having been served with Freeman & Hawkins' incriminating time slips and aware of the private breakfast meeting had no alternative as an attorney with duties to the federal courts and to his clients but to raise at law the issue of an appearance of impropriety; indeed, he would have been guilty of malpractice to suppress the evidence. But having fulfilled his duties, counsel urges the Court to consider the interests of judges, the legal system, and grant the writ and rule expressly upon the acts enumerated in the petitions, so that the bench — composed of so many outstanding jurists — will know the parameters of judicial ethics.

D. **Ethical Guidance to Kutak Commission**

"Watergate" scandalized a segment[8] of the legal profession and galvanized the private bar into steps to tighten legal ethics. A widely-publicized action by the American Bar Association in 1977 was creating the Commission on Evaluation of

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[5] S. Kantor, *Two Atlanta U.S. Judges Accused of Legal "Misconduct"*, THE ATLANTA CONSTITUTION, October 17, 1980, p. 1, col. 1.

[6] See Footnote *5 supra;* article also published in THE ATLANTA JOURNAL, October 17, 1980 at p. 2-C, col. 7.

[7] The district judge's name does not appear in either cert. petition and the bankruptcy judge's last name appears in two footnotes taken from respondents' incriminating time slips and depositions.

[8] Very few were actively engaged in the private practice of law at the time of their transgressions.

Professional Standards which published its "discussion draft" of the "Model Rules of Professional Conduct" on January 30, 1980. Among the numerous precepts expounded are those touching upon *ex parte* proceedings (Canon 3.5) and preserving the impartiality of the tribunal (Canon 3.7(b)). Indeed, a comment about the latter canon provides:

> "The lawyer is required to avoid contributing to any such impropriety [by a judge] or its appearance." (Model Rules at 76).

These cases bear upon the content and scope of those two canons. The canons were produced by a commission whose chairman, Robert J. Kutak,[9] is the titular head of respondent Aetna's law firm and "name partner" of the Aetna lawyers committing the acts attacked by petitioners. Many reasons come to mind why, on that basis alone, the Supreme Court should grant the writs. For example, at the court-ordered deposition of R. W. Ide III, the following colloquy occurred:

> Q. [By Petitioners' Counsel] Did you have any conversations with Judge Norton, when I was not present, about the Georgia Paneling case?
>
> MR. DOBBS: Object to the question and instruct him not to answer.
>
> BY MR. BISHOP: Q. Do you refuse to answer that question?
>
> A. [By R. William Ide III] I refuse to answer the question. (Deposition, R. William Ide III, March 3, 1978 at 17.)

Another example, at the court-ordered deposition of C. Edward Dobbs, the following colloquy took place:

> Q. [By Petitioners' Counsel] Mr. Dobbs, did you not write part of the opinion of Judge Norton that came out January 5, 1978?
>
> MR. IDE: Don't answer that question.
>
> * * *
>
> Q. Is it not true that the reason why there was an order of December 20, 1977 that's referred to [as] an opinion to be entered was because you and Mr. Cronkright and Mr. Pennington could not agree on all the wording of the opinion?
>
> MR. IDE: Don't answer that question.

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[9] R. Kutak, *Model Rules of Professional Conduct*, 66 Am. B.J. 47 (January 1980).

BY MR. BISHOP: Q. Is that not true? Do you refuse to answer that question?

A. [By C. Edward Dobbs] Yes.

(Deposition, C. Edward Dobbs, March 3, 1978 at 21).

Are these views of the Kutak firm to become the ethical standards of the American legal profession?

E. Legislative Check on Judiciary

The founding fathers implemented a system of checks and balances among the three branches of our national government.[10] The judiciary's checks on the legislature[11] and executive[12] are well known. The legislature's check on the judiciary does not permit salary reduction or termination of office provided there is "good behavior."[13] Yet it is not confined solely to advise the executive and consent to the appointment of federal judges. One check is Congress's power over the original jurisdiction of the "inferior" courts. A less well known check is power to define judicial good and bad behavior as to an individual case or controversy.

For example, Congress passed 28 U.S.C. §144 in 1911 to furnish a means of removing a federal judge from a case for bad behavior, namely, bias or prejudice. This Court accepted that limitation. *Berger v. United States*, 255 U.S. 22 (1921). Another check was pre-1974, 28 U.S.C. §455 which defined bad behavior in an individual case or controversy as an improper connection with a case, as by substantial interest, having been of counsel, or a material witness, or related or connected in such a fashion as to deny an impartial tribunal.

Congressional review of the case law under §144 and pre-1974 §455 disclosed the statutes were largely ineffective. Therefore, Congress determined to remove the technicalities which were used to trip up litigants and passed the December 1974 amendment to §455 which in paragraph (a) requires *sua sponte* disqualification where a judge's impartiality might reasonably be questioned in a case or controversy. This law too has been interpreted so as to make it ineffective. *Davis v. Board of School Commissioners*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied* 425 U.S. 944 (1976); *Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir.), *cert. denied* 94 S.Ct. 3232 (1974)

Some observers have called for Congress to empower a litigant to change judges upon the litigant's sole determina-

[10] *The Federalist*, No. 47, 48, 51, 79.

[11] *Marbury v. Madison*, 2 L.Ed. 60 (1803).

[12] *United States v. Nixon*, 418 U.S. 683 (1974).

[13] Art III. App. at 172.

tion of bias or prejudice, as an answer to the ineffectiveness of §144 and 455 (pre- and post- 1974).

Rather Congress has chosen another vehicle, for the time being. On October 2, 1980, Congress passed "The Judicial Council's Reform and Judicial Conduct and Disability Act of 1980" which has been reported as allowing the Judicial Conference of the United States ultimately to mandate that a federal judge be retired, be placed on inactive status for disability, have his cases withheld for a specified period, or be reprimanded publicly or privately. This check on the judiciary by the legislature has resulted from widespread perception of individual weaknesses in the lower federal judiciary.[14]

Federal judges deserve to know the parameters of judicial conduct. These petitions and October Term 1980 would afford such an opportunity. To petitioners' knowledge, this would be the first major case examining substantial evidence of judicial misconduct since 1966;[15] the first to consider the December 1974 amendments to 28 U.S.C.A. §455 (a); and the first to consider the Code of Judicial Conduct for United States Judges, adopted by the Judicial Conference of the United States on April 5, 1973.[16]

IV. COURTS OF APPEALS CONFLICTS

A. The Fee Award Case

Circuit Conflict (1).[17] Notwithstanding the total absence of bad faith findings in the Aetna-prepared, September 11, 1978 memorandum[18] regarding petitioners' participation in the plenary action pending before another court[19] the bankruptcy judge awarded respondents $8,980. In the Aetna-prepared November 14, 1978 memorandum,[20] the judge justified this award as consequential damages. The district judge affirmed,[21] as did the court of appeals for the Fifth Circuit after

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[14] *Congress Passes Judicial Discipline Bill,* THE ATLANTA JOURNAL, October 2, 1980, p.3C; Cf. *Duplantier v. United States,* 606 F.2d 654 (5th Cir. 1979).

[15] *United States v. Grinnell Corp.,* 384 U.S. 563 (1966).

[16] For example, does a litigant have standing to raise a breach and to obtain relief from substantive judicial action after a violation of the Code.

[17] "To justify a fee award, must an adversary party's attorneys' fees be proximately caused by the offending litigant's or his attorney's bad faith conduct, or must the fees simply bear a casual "but-for" relationship to bad faith conduct." Question No. 9, cert. petition, 80-345.

[18] App. at 105.

[19] *Pennington v. Aetna Business Credit, Inc.,* Civil Action No. C75-1540A, N.D. Ga., filed August, 1975.

[20] App. at 137; *cf.* Tables I and IV, App. at 263 and 268.

[21] App. at 86, 87, 91.

vacating a panel opinion upon a petition for rehearing.[22] This "but-for" causation is clearly less stringent than the proximate causation required by the Second Circuit in *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977).[23]

Circuit Conflict (2).[24] "[T]he allegations of judicial misconduct contained in [petitioners' FRAP 40(a) rehearing petition]"[25] filed November 11, 1978[26] were partially enumerated in the second panel opinion[27] and ultimately held not to be frivolous.[28] Nevertheless, the court of appeals for the Fifth Circuit affirmed the district judge on the "clearly erroneous" standard of Fed.R.Civ.P. 52.[29] By contrast, in *Hatahley v. United States,* 351 U.S. 173 (1956), the government argued that the district judge was so prejudiced that the trial was improperly conducted and the court of appeals should not rely on the trial judge's findings of fact. This Court responded that after review of the record and oral argument it did "not find that the trial was conducted so improperly as to vitiate these findings." (351 U.S. at 177, n.3). Conversely, if the trial was improperly conducted the findings of fact would have been "vitiated." Petitioners read *Roberts v. Ross,* 344 F.2d 747 (3d Cir. 1965), to similar effect, thus creating a conflict on applicability of the clearly erroneous rule,[30] rather than an unsettled federal question.

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[22] App. at 84, 83, 82.

[23] "[A]n award of attorneys' fees should be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedure moves. No attempt was made below to relate claimed expenses, costs, and fees to particular bad faith maneuvers." 560 F.2d at 1089.

[24] "*Whether* the standard of appellate review upon a trial judge's findings of fact adopted via *ex parte* work sessions *should be* the "clearly erroneous" standard under Fed.R.Civ.P. 52." Question No. 10, cert. petitions, 80-344 and 80-345.

[25] App. at 7.

[26] The petition has been certified to this Court because judges in the future may want to know what they can safely do after the third panel apparently approved of the conduct therein alleged.

[27] App. at 3; *vacated* App. at 2.

[28] App. at 1.

[29] App. at 85; App. at 10.

[30] There are two other exceptions to the clearly erroneous rule which would apply in the instant cases:

(1) Although this court has *suggested* that the clearly erroneous standard of appellate review does not apply where the evidence is documentary, *see, United States v. General Motors Corp.*, 384 U.S. 127 (n. 16) (1966), the question is technically unsettled and the circuits are split. On the one hand, the Second Circuit, *United States, ex rel. Gonzalez v. Zelker,* 477 F.2d 797 (1973); *see also, Agrashell, Inc. v. Bernard Serotta Co.*, 344 F.2d 583 (1965); *Orvis v. Higgins,* 180 F.2d 537 (1950); the District of

continued on next page

B. The 60(b) Case

Circuit Conflict (3).[31] Facts of disqualification were raised in the 60(b) case for the first time on appeal to the district court from the bankruptcy court. This is permissible. *Davis v. Board of School Commissioners,* 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied* 425 U.S. 944 (1976). Yet the district court absolutely ignored the facts.[32] The court of appeals for the Fifth Circuit did not, and held that "[t]he occurrence of *ex parte* conferences between the bankruptcy judge, the trustee, and Aetna's lawyer alone do not demonstrate collusion."[33] Nevertheless, the first panel denied relief and stated:

> "Neither have petitioners shown that there exists the requisite extrajudicial basis of prejudice and bias under 28 U.S.C.A. Sec. 455."[34]

The first panel vacated this opinion stating its reasons to be "[b]ecause of the allegations of judicial misconduct contained in the petition for rehearing . . . ."[35] The question presented is whether the first panel found the facts of disqualification to be extrajudicial or found the requirement inapplicable where an unarticulated exercise of the supervisory power is mandated. There would seem to be more support for the former (alleged facts are extrajudicial) than the latter since the supervisory power was not ultimately exercised. But if the latter (not relevant to supervisory power), extrajudicial misconduct can

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Columbia Circuit, *Dollar v. Land,* 184 F.2d 245 (1950), *United States v. John McShain, Inc.,* 258 F.2d 422 (1958); the Third Circuit, *Hadco Products, Inc. v. Walter Kidde & Co.,* 462 F.2d 1265 (1972); the Eighth Circuit, *Teamsters Local Union No. 688 v. Crown Cork & Seal Co.,* 488 F.2d 738 (1973), refuse to apply the clearly erroneous rule to documentary evidence, whereas the Fifth Circuit will apply the rule, *In re Georgia Paneling Supply, Inc.,* 581 F.2d 520 (1978). This Court rejected the Advisory Committee's proposed amendments to Fed.R.Civ.P. 52(a) in 1958 that the clearly erroneous standard be applied to all findings of fact. 7A *J. Moore's Federal Practice,* para. 52.01[8]. Rule 60(b) evidence is documentary.

(2) This Court is not bound by the clearly erroneous standard in reviewing "ultimate conclusions of fact," drawn by Aetna for the bankruptcy judge; that is, factual conclusions that mandate the application of a standard of law are exempt from the rule. *Baumgartner v. United States,* 322 U.S. 665 (1944) (Mr. Justice Frankfurter). The determination that Aetna had a colorable claim to the insurance proceeds requires such a fact law mixture, as does the finding that the bankrupt was not prejudiced by Aetna's conversion of the proceeds.

[31] "*Whether* it is relevant for purposes of 28 U.S.C.A. Sec 455, Fifth Amendment Due Process, Code of Judicial Conduct for United States Judges that facts of disqualification *constitute* 'extrajudicial' acts." Question No. 7, cert. petition, 80-344.

[32] App at 11.

[33] App at 10.

[34] *Ibid.*

[35] App. at 7.

occur in a trial setting where the judge's knowledge comes solely from the proceedings, pursuant to the Sixth Circuit case, *Nicodemus v. Chrysler Corp.*, 596 F.2d 152 (6th Cir. 1979), which creates a conflict with the Fifth Circuit.

Circuit Conflict (4).[36] Automatic adoption of Aetna-prepared orders occured June 13, 1977,[37] September 1, 1977[38] and probably January 5, 1978,[39] September 11, 1978,[40] and November 14, 1978.[41] The district judge found the conduct "not exemplary, but neither was [the findings of fact?] clearly erroneous" and affirmed,[42] as did the court of appeals for the Fifth Circuit.[43] By contrast the Tenth Circuit labels the procedure "indefensible and almost universally condemned." *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation*, 616 F.2d 464 at 469 (n.7) (10th Cir. 1980).

The Supreme Court has not held automatically adopted findings to be void and has not condemned the practice in unequivocal terms, but has merely spoken through the harsh words of Circuit Judges Frank (Second Circuit) and Wright (D. C. Circuit) in two relevant cases.[44] This Court might look on this as a question whether to be explicit.

Circuit Conflict (5).[45] The second panel opinion lists a few of petitioners' reasons for judicial disqualification of the bankruptcy judge. The most specific involve "*ex parte* discussions with appellees and their counsel" and the drafting and typing of orders and an opinion for the judge.[46] The court holds as follows:

> "The request for relief under Rule 60(b) (3) is premised upon numerous allegations of misconduct

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[36] "*Whether* a trial judge's automatic adoption of a prevailing party's findings of fact *is acceptable*." Question No. 8, cert. petition, 80-344.

[37] See footnote No. 16 on page 9, cert. petition, 80-345.

[38] See page 9 (as corrected September 18, 1980), second full paragraph.

[39] If one's view of the bankruptcy judge's and the respondents' credibility is jaundiced after their briefs in this Court and otherwise.

[40] As all Aetna-prepared orders, they bear Aetna's characteristic caption.

[41] *Ibid.*

[42] App. at 86.

[43] App. at 85.

[44] *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

[45] "*Whether* 'fraud . . ., misrepresentation, or other misconduct of an adverse party' (Fed.R.Civ.P. 60 (b) (3)) *must be prejudic[ial]*,' 607 F.2d 117, 118, before a trial judge will relieve an opposing party from a final order of bankruptcy judge approving a settlement between a trustee and a creditor." Question No. 9, cert. petition, 80-344.

[46] App. at 5.

by the trustee and Aetna. We find that the charges are either unsupported by the record or concern actions which did not prejudice appellants."[47]

Petitioners read this as a condonation of misconduct which is not legally prejudicial.[48] It was repeated by the subsequent reinstatement.[49] As such the rule in this circuit would seem to differ from the 10th Circuit. *Oliver v. City of Shattuck, Oklahoma, ex rel. Versluis,* 157 F.2d 150 (1946).

V. FALSE ASSERTION THAT JURY TRIAL ISSUE NOT RAISED BELOW[50]

A. Briefs in Court of Appeals in Which Raised

Petitioners filed "Reply Brief of Appellants" in the court of appeals on or about September 11, 1979. "Statement of Additional Issues" raises the question of absence of jury trial.[51] Petitioners asked the court of appeals to certify this brief to this Court. The opinion entered November 9, 1979 was followed by a petition for rehearing *en banc* filed December 3, 1979. "Statements of Petitioners' Counsel Required by Fifth Circuit Rule 16.2.2 and 16.2.4" also raise the jury trial issue.[52]

The court of appeals vacated the opinion December 28, 1979. On panel rehearing, May 9, 1980, the Court reinstated the November 9, 1979 opinion and petitioners filed a second petition for rehearing *en banc* on May 23, 1980. This brief was submitted to this Court as Exhibit G to application for stay, etc. filed June 30, 1980. Jury trial issues were raised and discussed in footnote on page xxxiii.

B. District Judge's Premature Affirmance

The bankruptcy order of June 7, 1978 imposing the fee

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[47] App. at 6.

[48] An example where this could occur would be where petitioners had waited too long to file their 60 (b) (3) motion, as the bankruptcy judge ruled.

[49] Mr. Justice Powell commented adversely about a district judge's reinstatement of a previous decision after the Supreme Court vacated his previous decision. *Moore v. Brown,* Case No. A-195, 49 USLW 3162 (Sept. 5, 1980).

[50] "[Petitioners] did not raise the absence of a jury trial as a question for review by the Court of Appeals . . . ." (Aetna's Brief at 10).

[51] [W]as it not improper for the [bankruptcy judge] to sit as a trier for fact and did he err in not calling for a jury trial on the issue of appellants' state of mind?"

[52] "[W]as it not improper for the bankruptcy judge to sit as trier of . . . fact, and did not the Panel opinion err in not reversing the case under the Sixth Amendment . . . for a jury trial in bankruptcy court in order to guard petitioners against the Bankruptcy Judge's bias or mistake.' " (at page xviii).

awards purported to delay the effective date of the order until findings of fact and conclusions of law were entered. Petitioners determined that the effort was void and filed an appeal within the 10-day period under Bankruptcy Rule 802. The district judge ultimately agreed that petitioners properly appealed. Order, October 13, 1978.[53] However, petitioners determined they could not file a statement of issues, a designation of the record or an appellate brief until the findings and conclusions were filed. No appellate document from petitioners (or respondents) was of record when the district judge unexpectly affirmed the June 7, 1978 order on August 30, 1978 (App. at 86). Therefore, petitioners had no opportunity to complain to the district court of a denial of jury trial.

C. **Question Waiver of Jury Trial in Bankruptcy**

Petitioners did not ask for jury trial in bankruptcy court, but they were not on notice that a large monetary judgment could be entered against them until five months had elapsed after the initial hearing on the fee applications. The fee motions came on for hearing on September 19, 1977, and supporting affidavits and time slips of Aetna's counsel were not filed until February 15 and 21, 1978, nor of the trustee until February 27, 1978, nor of the trustee's co-counsel, until March 2,

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[53] Fed.R.Civ.P. 52(b) allows motion to amend trial judge's findings of fact within ten days of entry of judgment. The ten day rule is strictly applied. *Peterson v. Rath Packing Co.*, 461 F.2d 312 (8th Cir. 1972). Therein lies the source of petitioners' dilemma.

The order entered June 7, 1978 contains no findings of fact but states that "the time for filing a notice of appeal from this order shall begin to run from the date that an opinion containing findings of fact and conclusions of law is entered . . . ." (App. 104). Notwithstanding the quoted language, Bankruptcy Rule 802 requires notice of appeal to be filed within ten days of the entry of the bankruptcy judge's order, and allows the judge upon motion of a party to extend the time for filing by not more than twenty days. No motion for extension of time was made and notice of appeal to the district court was timely filed June 16, 1978.

Even though findings and conclusions had yet to be filed, the district judge affirmed the order August 30, 1978 and entered judgment against petitioners August 31, 1978. (*See*, Docket Sheet, United States District Court, Northern District of Georgia, Bankruptcy No. B74-1628A, June 24, 1974 to September 29, 1978, located as an index at the front of Record on Appeal Vol. I, case No. 79-1075, which was certified to this Court by the court of appeals). Even if the August 31, 1978 entry of the district court judgment is deemed the date triggering the ten day period for challenging the findings of fact rather than the June 7, 1978 entry of the bankruptcy judge's order, the rule 52(b) right to challenge the findings of fact without having to overcome the "clearly erroneous" presumption was cut off *since the findings of fact were not filed until the eleventh day after the entry of judgment, September 11, 1978.*

1978. There was no reasonable opportunity to make demand for jury trial within ten days after the commencement of proceedings.[54] Moreover, petitioners' counsel was expressly removed from the focus of the awards by Aetna's withdrawal of verbal claim in open court, February 14, 1978, and by the bankruptcy judge's indication that petitioners' counsel would not be subject to the award, also on February 14.

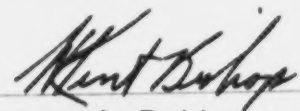
A presumption against waiver of Seventh Amendment right to trial by jury is recognized. *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389 (1937). *See, Columbia River Packer's Association v. Hinton,* 34 F.Supp. 970 (D. Ore. 1939); *Collins v. Government of Virgin Islands,* 366 F.2d 279 (3rd Cir. 1966); Cf. *United States v. Brown,* 569 F.2d 236 (5th Cir. 1978).

VI. CONCLUSION

Petitioners' harsh judgment of respondents' briefs has producted an opinion that they imply a disrespect for the federal courts, a disrespect bred of an ability to manipulate the bankruptcy judge to their own ends and to escape the consequences. Petitioners suggest a contrast with their demonstrated faith that justice ultimately will be done. But respondents' briefs should be the last straw; this Court should grant the writs to say, "Don't tread on me!" (Continental Navy Battle Flag 1775).

Respectfully submitted,

WINFORD KENT BISHOP



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[54] Cf. Fed. R. Civ. P. 38.

VII. CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Reply Brief of Petitioners upon each respondent by depositing same in the United States Mail, sufficient postage prepaid, properly addressed to counsel at their last known addresses.

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This 27 day of October, 1980.

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344